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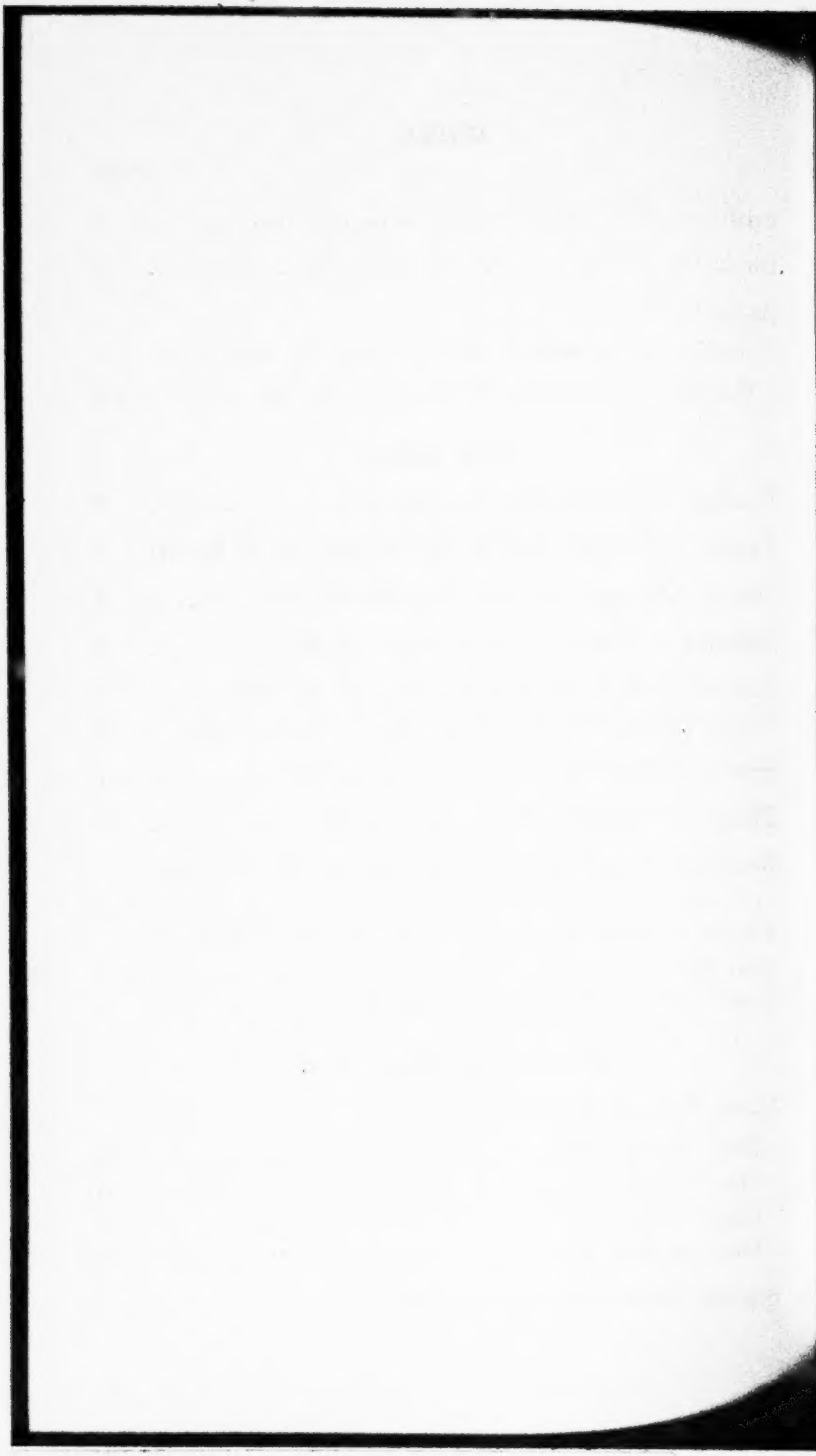

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1451

HERBERT F. WASCHER,
Petitioner,

vs.

RANDOLPH LUNDEEN, CHAMPAIGN-URBANA CITY LINES, INC., a Corporation, and NATIONAL BANK OF MONTICELLO, a Banking Corporation,
Respondents.

BRIEF OF RANDOLPH LUNDEEN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

We deem the following necessary to correct inaccuracies and omissions in the statement contained in the petition. We respond in conformance with the order and numbers set forth in Supreme Court Rules 23 and 40.

1. (a). The decision of the Fourth District Appellate Court of Illinois is reported:

Wascher v. Lundeen, Gen. No. 11,033, 111 Ill. App. 2d 452;

Denial of petition for leave to appeal by the Supreme Court of Illinois, No. 42615, is reported: 43 Ill. 2d 222.

We are unable to determine if such opinions are appended to the petition in accordance with Supreme Court Rule 23, 1. (i); however, we append such opinion herewith, along with the opinion in a companion case,

Wascher v. Lundeen, 32 Ill. App. 2d 239, 177 N. E. 2d 440,

reference to which may be necessary to ascertain grounds of the decision sought to be reviewed.

1. (e). On March 26, 1932, the petitioner, Herbert F. Wascher, was adjudged incompetent and the National Bank of Monticello was appointed Conservator of his estate. The petitioner was involved in a traffic accident on February 10, 1955 when he allegedly suffered personal injuries, following which his duly appointed, qualified and acting Conservator, the National Bank of Monticello, filed suit in the Champaign County Circuit Court on March 6, 1956 against the respondent, Randolph Lundeen, and the Champaign-Urbana City Lines, for the alleged personal injuries. That case was carried on the dockets of the Champaign County Circuit Court as Common Law Case 56-L-49 and issue was duly joined by the defendants therein.

Negotiations for settlement of petitioner's personal injury claims were conducted by his Conservator, National Bank of Monticello, with the assistance of attorneys engaged for that purpose. These negotiations resulted in a settlement of the petitioner's alleged personal injury claim as to respondent, Randolph Lundeen, and the Champaign-Urbana City

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Lines. National Bank of Monticello, as petitioner's Conservator, petitioned the Champaign County Court, which Court had jurisdiction of petitioner's conservatorship, for leave to compromise and settle the personal injury claim of the petitioner. That petition was filed on September 9, 1957 and the Champaign County Court entered its order granting leave to compromise and settle petitioner's claim. The Court allowed the Conservator's petition; settlement was accomplished, and petitioner's Conservator executed due and proper releases to respondent, Randolph Lundeen, and Champaign-Urbana City Lines, under date of September 9, 1957. On that same day, judgment and order was entered in Champaign County Circuit Court dismissing petitioner's common law case as settled.

On November 25, 1959, petitioner, Herbert F. Wascher, by his next friend, Jesse Gibson (subsequently replaced by next friend, Walter Reinhold), filed suit against the respondent, Randolph Lundeen, and Champaign-Urbana City Lines, claiming personal injuries to petitioner arising from the same alleged cause of action as those previously sought by petitioner's Conservator in Common Law Case 56-L-49. This suit filed in Champaign County Circuit Court by the petitioner, through his next friends, was carried on the dockets of the Champaign County Circuit Court as Common Law Case 59-L-344. Motions of the respondent, Randolph Lundeen, and the Champaign-Urbana City Lines, under Section 48 of the Illinois Civil Practice Act were allowed and judgments accordingly entered in their favor. Petitioner, by his next friend, then appealed this judgment to the Appellate Court of Illinois (then), Third District. The Appellate Court affirmed the judgment of the Champaign County Circuit Court in favor of respondent, Randolph Lundeen, and Champaign-Urbana City

Lines. This decision was entered October 18, 1961 as General Number 10356 reported:

Wascher v. Lundeen, 32 Ill. App. 2d 239.

Petitioner's petition for certificate of importance to the Supreme Court of Illinois was denied by order of that Court entered November 17, 1961.

Petitioner on February 28, 1968 filed a complaint in the Champaign County Circuit Court, Common Law Case 68-L-168, against respondent, Randolph Lundeen; Champaign-Urbana City Lines; and the National Bank of Monticello, alleging that an order was entered by the Champaign County Court on March 1, 1967 adjudging him not incompetent and revoking letters of conservatorship. In this lawsuit petitioner claimed damages for personal injuries for the same traffic accident involved in the two preceding Common Law Cases Nos. 56-L-49 and 59-L-344 heretofore described. Motions of all defendants in that case under Section 48 of the Illinois Civil Practice Act were allowed. The Champaign County Circuit Court took judicial notice of the proceedings in both prior actions, as well as the decision of the Illinois Appellate Court. The petitioner elected to stand on that pleading and the Champaign County Circuit Court entered its judgment in favor of all of the defendants and against the petitioner.

Petitioner by notice of appeal to the Fourth District Appellate Court of Illinois again sought review. The Illinois Appellate Court, Fourth District, rendered its decision on August 4, 1969 affirming the judgment and decision of the Champaign County Circuit Court in favor of respondent and the other defendants in that case. The Appellate Court decided all questions raised by respondent adversely to respondent. The decision of that Appellate Court is reported in:

Wascher v. Lundeen, 111 Ill. App. 2d 452.

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Petitioner filed petition for leave to appeal to the Illinois Supreme Court, which was denied November 24, 1969;

Wascher v. Lundeen, 43 Ill. 2d 222.

1. (g). We submit respectfully that no Constitutional provisions, treaties, statutes, ordinances, or regulations concerning a Federal question or any right of the petitioner is involved which constitutes a basis for this Court, in the exercise of sound judicial discretion, to review this matter by Writ of Certiorari.

On page 2 of the petition, petitioner refers to some involvement of the Veteran's Administration, but nothing with respect thereto is set forth, and this respondent has no knowledge of any such involvement.

Petitioner refers to due process, presumably involving provisions of the Fourteenth Amendment, with the apparent claim that due process was denied him.

Quite the contrary is the fact. This petitioner was involved in a traffic mishap in February of 1955 at which time he suffered some personal injury. Three lawsuits were filed by him, or in his behalf, in the Champaign County Circuit Court. During the pendency of the first case filed in Champaign County Circuit Court, petitioner's Conservator effected a settlement of his alleged cause of action, all with the approval of the Champaign County Court, in probate, which had jurisdiction over his conservatorship. Petitioner has had the entire matter reviewed by the Appellate Court of Illinois on two occasions and decisions of that Court have been rendered, copies of which opinions are attached hereto. The Supreme Court of Illinois has found nothing to constitute the basis for its review in either of those Appellate Court decisions.

The following statutory provisions enacted by the Illinois General Assembly outline functions of a Conservator so far as this matter is concerned:

"The conservator of the estate under the direction of the court shall have the care, management and investment of the ward's estate * * *."

ILLINOIS REVISED STATUTES, 1959, Chap. 3, Sec. 122.

"The conservator of the estate of an incompetent shall appear for and represent his ward in all legal proceedings unless another person is appointed for that purpose as conservator or next friend. But this does not impair the power of any court to appoint a conservator or next friend to defend the interests of the ward in that court, or to appoint or allow any person as the next friend of a ward to commence, prosecute, or defend any suit in his behalf."

ILLINOIS REVISED STATUTES, 1959, Chap. 3, Sec. 124.

"By leave of court without notice or upon such notice as the court directs as executor, administrator, guardian or conservator may compound or compromise any claim or any interest of the ward or the decedent in any personal estate or exchange any claim or any interest in personal estate for other claims or personal estate upon such terms as the court directs.

ILLINOIS REVISED STATUTES, 1959, Chap. 3, Sec. 215.

"The guardian or conservator of the estate of a ward shall settle all accounts of his ward and demand and sue for and receive in his own

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name, as guardian or conservator, all personal estate and claims of the ward."

ILLINOIS REVISED STATUTES, 1959, Chap. 3, Sec. 216.

The National Bank of Monticello, as petitioner's Conservator, was the proper party to represent the ward in all legal proceedings, and it was the proper party to sue for and receive in its name, as Conservator, all personal estate and claims of the petitioner, including the petitioner's claims for personal injuries.

Liska v. Chicago City Ry. Co., 318 Ill. 570 at 577;
Paskewie v. E., S. L. & S. Ry. Co., 281 Ill. 385.

When the National Bank of Monticello was appointed petitioner's Conservator, this respondent and the other defendants in the actions brought by, or on behalf of the petitioner, were required to deal with that Conservator, as the petitioner being under conservatorship could not act for himself.

Bradshaw v. Lucas, 215 Ill. App. 218.

The National Bank of Monticello, as petitioner's Conservator, by its petition in the County Court of Champaign County, secured the approval and order of that Court to compromise petitioner's claim. The release executed by petitioner's Conservator upon the specific order and authority of the Champaign County Court, the only Court of competent jurisdiction, constitutes the release of the petitioner, who could act in no other way than by and through his Conservator. The release and settlement was valid and binding.

Shine v. Wabash R. Co., 8 Ill. App. 2d 521;
Thomas v. Hollowell, 20 Ill. App. 2d 288;
Bradshaw v. Lucas, 214 Ill. App. 218.

In the original suit by petitioner's Conservator for his personal injuries and the proceeding in the

Champaign County Court for approval of the settlement, the National Bank of Monticello, as petitioner's Conservator, was in privity with petitioner. Petitioner could act in no other way than by and through his duly appointed and acting Conservator.

People v. Kidd, 398 Ill. 405, p. 408, 75 N. E. 2d 851;

McCarthy v. McCarthy, 9 Ill. App. 2d 462.

The petitioner, in his petition before this Court, makes reference to "concealment and fraud"; however, no allegations were contained in any complaint filed which stated a cause of action based upon such insinuations.

Fortune v. English, 226 Ill. 262 at 269, 80 N. E. 781.

CONCLUSION

We respectfully submit that this petitioner has had fair and complete hearings in the Courts of the State of Illinois. During the period of his incompetency, he was well and properly represented by his Conservator. The orders, judgments, and decisions of the Courts of the State of Illinois assured him fair, honest treatment. He was not denied due process of law. Respondent prays that the Petition for Writ of Certiorari will be denied.

Respectfully submitted

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APPENDIX

W. ARCHER v. LUNDGREN
111 Ill. App. 2d 452

[452]

Herbert F. Wrechen, Plaintiff-Appellant, v. Randolph Lundgren, Champaign-Urbana City Lines, Inc., a Corporation, and National Bank of Monticello, a Banking Corporation, Defendants-Appellees.

APPENDIX.

Gen. No. 11,033.

Fourth District.

August 14, 1968.

1. Fraud and deceit, § 167 [1]—sufficiency of use of words "fraud" and "concealment" in complaint.

Use of such words as "fraud" and "concealment" in complaint alone does not create cause of action.

2. Evidence, § 39 [2]—judicial notice of judgments.

In injury action instituted after plaintiff, who once had obtained an incompetent, was adjudged not to be an incompetent, judicial notice was required to be taken of judgment dismissing original injury action instituted by conservator of estate of present plaintiff, of judgment in proceedings for approval of settlement entered into between conservator and defendants, and of judgment in subsequent action instituted by next friend after dismissing without, for conservator to tender settlement sum back and to again sue recovery.

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APPENDIX

WASCHER v. LUNDEEN
111 Ill. App. 2d 452

[452]

Herbert F. Wascher, Plaintiff-Appellant, v. Randolph Lundeen, Champaign-Urbana City Lines, Inc., a Corporation, and National Bank of Monticello, a Banking Corporation, Defendants-Appellees.

Gen. No. 11,033.

Fourth District.

August 14, 1969.

1. Fraud and Deceit, § 167 *—sufficiency of use of words "fraud" and "concealment" in complaint.

Use of such words as "fraud" and "concealment" in complaint alone does not create cause of action.

2. Evidence, § 35 *—judicial notice of judgments.

In injury action instituted after plaintiff, who once was declared an incompetent, was adjudged not to be an incompetent, judicial notice was required to be taken of judgment dismissing original injury action instituted by conservator of estate of present plaintiff, of judgment in proceedings for approval of settlement entered into between conservator and defendants, and of judgment in subsequent action instituted by next friend after obtaining authority for conservator to tender settlement sum back and to again seek recovery.

3. Former Adjudication, § 49 *—conservator as in privity.

Conservator of estate of person declared an incompetent, who instituted injury action as conservator, and who instituted proceedings for approval of settlement entered into between conservator and defendants, was in privity with his incompetent, for purpose of application of doctrine of res judicata when such incompetent, after being adjudged not to be an incompetent, instituted injury action against same defendants in his own name.

Appeal from the Circuit Court of Champaign County; the Hon. BIRCH E. MORGAN, Judge, presiding. Affirmed.

Unger and Stewart, of Danville, for appellant.

Phillips, Phebus, Tummelson & Barth, of Urbana (Hurshal C. Tummelson and Francis J. Jahn, of counsel), Summers, Watson & Kimpel, of Champaign (Robert C. **[453]** Summers, of counsel), Hayes & Moore, Wheat, Hatch, Corazza & Baker, of Champaign (Harold A. Baker and Timothy O. Madigan, of counsel), for appellees.

TRAPP, P. J.

This is an appeal from a judgment of the circuit court dismissing a suit by plaintiff against defendants pursuant to motions of the defendants under section 48 of the Illinois Civil Practice Act asserting prior judgments and releases and the insufficiency of the complaint to state a cause of action. C 110, § 48, Ill. Rev. Stats. 1967.

Plaintiff was declared incompetent on March 26, 1932, for reasons not disclosed in this record, and subsequently on March 20, 1944, defendant, National Bank of Monticello, was appointed conservator of his estate. On March

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* See Callaghan's Illinois Digest, same topic and section number.

1, 1967, he was adjudged not to be an incompetent and letters of conservatorship were revoked.

On February 10, 1955, plaintiff, while a pedestrian, was injured as a result of alleged joint and several negligence of defendants, Randolph Lundeen, an automobile driver, and Champaign-Urbana City Lines, Inc. Subsequently, the conservator of the plaintiff filed suit to recover damages from defendants, Randolph Lundeen and Champaign-Urbana City Lines, Inc., for the injuries.

On September 9, 1957, the conservator for the plaintiff petitioned the County Court of Champaign County for an order authorizing compromise and settlement of the suit upon payment of $2,000 by defendant, Randolph Lundeen, and $750 by defendant, Champaign-Urbana City Lines, Inc. The court granted the petition and the bank, as conservator, executed a release to the said defendants. On September 13, 1957, the conservator's common-law action on behalf of plaintiff was dismissed.

After such settlement one Jesse Gibson, as next friend of plaintiff, obtained authority for the conservator to [454] tender the settlement sum back and again to seek recovery from defendants. In 1959 Jesse Gibson, as next friend of plaintiff, filed suit against the defendants, Randolph Lundeen and Champaign-Urbana City Lines, Inc., charging negligence. These defendants filed a motion to dismiss the complaint on the ground that the next friend had no legal right to sue and that the suit was barred by the order of dismissal in the previous suit. The suit was dismissed. Gibson died and Walter Reinhold was substituted as next friend. Plaintiff, by his next friend, asked leave to amend and tender return of the money. This motion was denied and plaintiff, by his next friend, appealed to the Appellate Court. The judgment of the Circuit Court was affirmed in Wascher v. Lundeen, 32 Ill. App. 2d 239, 177 N. E. 2d 440.

The reviewing Court held that the order authorizing the tender of the money back was a permissive order to the conservator and did not substitute the first or second next friend for the duly appointed conservator, and did not revoke the order approving the settlement. It therefore, held that neither the first nor second next friend had authority to act. The court also found that since there was a conservator, no guardian ad litem was necessary. The court said there was no showing of adverse interest of the conservator, but only an allegation that full disclosure of the extent and permanency of the injuries was not made to the County Court.

The opinion expressed some doubt whether a release authorized by a court could be set aside absent misrepresentation, overreaching or fraud. It went on to find that there was no showing that the settlement was unfair or unjust. On the contrary, it found that the record showed that two competent attorneys, acting for the bank as conservator, determined that the amount received on the basis of the facts and the injuries, was reasonable and recommended the settlement be made. It [455] was on the basis of these matters of record that the County Court authorized the settlement.

The present suit generally charges fraud and concealment by the conservator in the County Court with reference to the seriousness of plaintiff's injuries. However, the specification of this charge is only that the conservator stated "in part" that the ward has made "satisfactory recovery" from the said injuries, whereas the conservator knew the ward had received "a serious and permanent type of injury." This same charge, except as to the language of fraud and concealment, was in the proceedings culminating in Wascher v. Lundeen.

[1] While there is always an area of doubt created by the charge of "fraud" and "concealment," it has long

been recognized by our courts that the use of such words alone does not create a cause of action. In Fortune v. English, 226 Ill. 262 on 269, 80 N. E. 781, our Supreme Court said of an alleged fraudulent concealment of a cause of action:

> "The words 'craftily,' 'fraudulently,' 'falsely' and 'maliciously' are of no avail in the absence of averments of facts to which they properly apply."

Without accepting an allegation of a "part" of a representation as sufficient to allege fraud, the quoted "satisfactory recovery" is not necessarily contradictory to the statement that plaintiff, in fact, had "a serious and permanent type" of injury. As to the materiality of the statement standing alone, it is recognized by all that settlement of a personal injury claim always involves consideration of the facts with reference to liability as well as the facts with reference to injury. Thomas v. Hollowell, 20 Ill. App. 2d 288 at p. 291, 155 N. E. 2d 827. The recommendation of settlement by the two attorneys who investigated the matter as stated in the record of the case previously appealed was found to be probably a rec-
[456] ommendation based upon the total fact situation, and not the situation with reference to injuries alone. The opinion expressly states that the allegation of concealment or failure to disclose was not borne out by any facts and that no fraud was shown.

It is upon the foregoing charges that plaintiff seeks to sue the original defendants and the conservator for the damages resulting from the original injuries to the plaintiff.

[2] Plaintiff asserts that the trial court had no authority to dismiss the action under section 48 of the Civil Practice Act, c. 110, § 48(1), Ill. Rev. Stats. 1967, because defendants' motions were unverified. It is con-

tended that there being an issue of fact raised, accompanied by a jury demand, the court had no alternative but to deny the motions to dismiss. In this case the basis of the motion is the prior judgment of the County Court approving the settlement, the prior judgment of the Circuit Court dismissing the conservator's original suit and the prior judgment in the case of Wascher v. Lundeen, 32 Ill. App. 2d 239, 177 N. E. 2d 440. These are all matters of which the court is required to take judicial notice. C. 110A, Rule 133(b), Ill. Rev. Stats. 1967. Moreover, the matters raised by the several motions were themselves alleged or recited in the complaint and there were no affidavits or proof denying the facts alleged or obviating the defect. C. 110, § 48(3), Ill. Rev. Stats. 1967.

[3] It is argued that the previous adjudications are not res judicata because identity of the parties is lacking. The identification in the authorities is "parties and their privies." The People v. Kidd, 398 Ill. 405, p. 408, 75 N. E. 2d 851. In the original suit by the conservator against Randolph Lundeen and Champaign-Urbana City Lines, Inc., and in the proceeding in the County Court for approval of the settlement the conservator was in privity with plaintiff. These judgments still stand.

[457] It is insisted that since the reviewing court in Wascher v. Lundeen, 32 Ill. App. 2d 239, 177 N. E. 2d 440, held that the next friend had no standing to represent plaintiff, the other matters contained in the opinion are of no effect, and the case is not an adjudication that the charges of invalidity of the releases and dismissal of the original suit are without merit. We note that opinion had the language, "Had there been any mistake, error, or omission we would have been inclined to hold that the releases should be held invalid." That court did, in fact, pass upon the merits of the case. The basis of the opinion of the reviewing court, which was seeking on

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its own to give every possible benefit to the incompetent within established principles of law, was the record of which we are required to take judicial notice. Having before us the very record which the reviewing Court had in the previous case, the order of the County Court of Champaign County approving the settlement, and the judgment of the Circuit Court of Champaign County dismissing the suit of the conservator against the original defendants are res judicata.

The judgment of the Circuit Court is affirmed.

Affirmed.

SMITH and CRAVEN, JJ., concur.

WASCHER v. LUNDEEN, 32 ILL. APP. 2D 239

[239]

Herbert F. Wascher, an Incompetent, by Walter Reinhold, His Next Friend, Plaintiff-Appellant, v. Randolph Lundeen and Champaign-Urbana City Lines, Inc., a Corporation, Defendants-Appellees.

Gen. No. 10,356.

Third District.

October 18, 1961.

1. Releases, § 9*—validity of conservator's releases.

Contention that a corporate plaintiff, which brought injury action against two defendants on behalf of estate of incompetent for whose estate it was conservator, had failed to fully disclose extent and permanency of its

* See Callaghan's Illinois Digest, same topic and section number.

ward's injuries when conservator successfully petitioned for authority to settle claims and to execute releases, was not borne out by facts, and releases were not void for failure of conservator to fully disclose extent and permanency of injuries to court.

2. Guardians ad Litem and Next Friends, § 1*—definition of guardian ad litem.

A guardian ad litem is one appointed for purpose of representing an infant or incompetent to prosecute or defend an action.

3. Guardians ad Litem and Next Friends, § 2.15 *—necessity of appointment.

Where injury action was brought on behalf of incompetent by conservator of his estate, acting through competent attorneys, court was not required to appoint a guardian ad litem to represent incompetent on hearing on conservator's successful petition for authority to settle claims against defendants and to execute releases, in absence of showing of adverse interest on part of conservator or of some other good and sufficient reason for appointment of some other person to represent incompetent.

4. Guardianship, § 71 *—conservator's right to compromise claim.

Where injury action was brought on behalf of incompetent by conservator of his estate, the conservator, upon approval of court, had power to compromise incompetent's claim (Ill. Rev. Stats. 1959, c 3, § 215).

5. Releases, § 9 *—validity of order authorizing releases.

Where conservator, which brought injury action against two defendants successfully petitioned for authority to settle claims [240] and to execute releases, executed releases for ordered amounts, the mere fact that upon a

later date the court authorized conservator to tender back and take further proceedings did not, of itself, in absence of further action by same court, invalidate original order which authorized releases.

6. Releases, § 9 *—validity of release.

Where a release was given by order of court it may only be held void where release is obtained by misrepresentation, overreaching, or other fraud, and a unilateral mistake is not sufficient.

Appeal from the Circuit Court of Champaign County; the Hon. BIRCH E. MORGAN, Judge, presiding. Affirmed.

Appleman, Zimmerly & McKnelly, of Champaign (Phillip C. Kimmerly, of Champaign, of counsel), for appellant.

Barth, Phillips, Phebus & Tummelson, of Urbana (Hurshal C. Tummelson, of Urbana, of counsel), for defendant-appellee Lundeen.

Dobbins, Hayes & Moore, and Wheat, Hatch & Corazza, of Champaign (Harold A. Baker, of Champaign, of counsel), for defendant-appellee Champaign-Urbana City Lines, Inc.

REYNOLDS, J.

Herbert F. Wascher, was adjudged incompetent in 1932, and since 1944 the National Bank of Monticello, Illinois, has been the conservator of his estate. On February 10, 1955, he sustained injuries when struck by an automobile driven by Randolph Lundeen, one of the defendants. Suit was brought in the Circuit Court of Champaign County by the conservator bank against Lundeen and the Champaign-Urbana City Lines, Inc. for damages, charging both defendants with negligence. The cause

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* See Callaghan's Illinois Digest, same topic and section number.

was settled by compromise, and the bank filed a petition in the County Court of Cham- [241] paign County, for authority to compromise and settle the claim of the incompetent for $2,750, on the basis of $2,000 from Randolph Lundeen and $750 from the bus company. The County Court by its order granted the petition and authorized a settlement for $2,750 and the conservator bank thereupon executed a conservator's release to the defendants, and the suit in Circuit Court was dismissed on September 13, 1957.

After the settlement for $2,750 had been authorized by the County Court, Jesse Gibson, as next friend of Wascher, filed a petition in County Court for authority and directions to appoint a conservator ad litem to reopen the Circuit Court case or to set aside the releases given therein, and for authority to tender back the money paid. This petition was granted by the County Court, in the following language: ". . . And on this day said petition of the incompetent by Jesse Gibson, his next friend being heard on proof submitted, upon consideration thereof, said petition is by the Court allowed and said Conservator authorized to tender sum in settlement against Randolph Lundeen, Champaign City Lines, Inc., and to incur expenses necessary in seeking recovery sought as set forth in said petition."

Subsequently, in 1959, Jesse Gibson, as next friend of the incompetent Herbert F. Wascher, filed suit in the Circuit Court of Champaign County, against Lundeen and the bus company, charging each with negligence. The defendant filed their motion to strike and dismiss the complaint, on the grounds that the next friend had no legal right to bring suit, and that the suit was barred by the order entered in the previous suit. The court allowed the motion and dismissed the suit as to each defendant. Later, Gibson died and Walter Reinhold was

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substituted as next friend. Plaintiff asked leave to amend the complaint and to tender return of the money, which was denied by the court. Plaintiff appeals to this court. [242] The plaintiff's theory is that the conservator did not fully disclose the extent and permanency of the ward's injuries to the County Court when it applied for authority to settle claims and to execute releases to the defendants; that there should have been a guardian ad litem appointed for the hearing on the petition to execute the releases; that the order of the County Court authorizing the conservator to tender back the money paid by the defendants and to proceed further against them was not carried out by the conservator bank, so that the releases were voided as a matter of law.

[1-3] The first point, that the conservator did not fully disclose the extent and permanency of the ward's injuries to the County Court is not borne out by any facts that would sustain this contention. The order of the County Court authorizing the conservator to settle the claims against the defendants and to execute releases, cited that Robert C. Summers and Busch & Harrington, duly licensed attorneys had been employed to investigate the circumstances of the injury and to represent the conservator in the suit against the defendants in the Circuit Court; that the attorneys had received offers of $2,750 and that the said attorneys had recommended to the conservator that the said causes of action be settled and releases be given. That a full investigation of the case had been made is further supported by the affidavit of John C. Hayes, attorney-at-law.

The appointment of a guardian ad litem is urged as mandatory. The two cases cited by the plaintiff each relate to a minor and there is nothing in either of those two cases to show that it is mandatory that a guardian ad litem be appointed where the ward has a duly qualified

and acting conservator. Nor, do the cases cited by defendant Lundeen reach this point. The Statute provides that the conservator of the estate of an incompetent shall appear for and repre- [243] sent the ward in all legal proceedings, unless another person is appointed for that purpose as conservator or next friend. But this does not impair the power of any court to appoint a conservator or next friend to defendant the interests of the ward in that court, or to appoint or allow any person as the next friend of a ward to commence, prosecute or defend any suit in his behalf. Ill. Rev. Stats., c. 3, § 124. This language is plain and unequivocal. The conservator of an incompetent shall represent the ward in all legal proceedings, unless in the discretion of the court, it is deemed advisable to appoint another person as conservator or next friend to represent the ward. After the court appoints the conservator, the conservator acts for the ward, unless there is a conflict of interest, or some other good and sufficient reason to appoint some other person to represent the ward. Pyott v. Pyott, 191 Ill. 180, 61 N. E. 288; Isle v. Cranby, 199 Ill. 39, 64 N. E. 1065. Here, the county court had full authority to appoint Jesse Gibson or any other person as conservator or next friend to represent the plaintiff, but it did not do so. There was no showing of an adverse interest on the part of the conservator, but only the allegation that a full disclosure of the extent of the injuries of the plaintiff was not made to the court. Yet, upon a petition to the county court setting out these injuries, by Jesse Gibson as next friend, court granted an order, permissive in character only, authorizing the conservator to tender back the money received and to prosecute further the original claims. This, the conservator bank did not do. Lacking appointment as provided for by the Statute, and failure to show any good and sufficient reason for the appointment of another conservator or next friend, it would seem that the next friend is without authority to institute or pursue

this suit. The contention of the necessity of a guardian ad litem would have some force, if there were no conservator or person author- [244] ized to act for the incompetent, since the duty of the court is to guard the interests of the incompetent at all times. A guardian ad litem is one appointed for the purpose of representing an infant or incompetent to prosecute or defend. We find no authority for the appointment of a guardian ad litem in this cause. Had the county agent appointed another person as conservator for this particular cause, or as next friend, that is provided for by the Statute. There was no necessity for a guardian ad litem appointment. Since there was no appointment of any kind, the conservator was the proper one to act for the ward. It may well be, that upon a proper showing the county court might have appointed the self-appointed next friend, to act for the plaintiff, but since this was not done, the first next friend, or the substitute, had no authority to act.

[4-6] That the conservator, upon approval of the court had the power to compromise the claim of the plaintiff is without question. Ill. Rev. Stats., c. 3, § 215, provides that by leave of court without notice or upon such notice as the court directs, a conservator may compound or compromise any claim or any interest of the ward. There is no contention here that the county court did not have jurisdiction of the estate of the incompetent. It had had jurisdiction since 1932. There is no error evident on the face of the record. There is no fraud shown. The brief for the plaintiff says the defendants were charged with notice of the infirmities of the conservator's release. But there are not infirmities shown. Here there was a release, executed by the amount as ordered by the county court. The mere fact that upon a later date, the court authorized the conservator to tender back and take further proceedings, does not, of itself, in the absence of further action by the same court, invalidate the original order of the

court, which authorized the releases. In [245] the light of the case of Voegel v. Central Nat. Bank of Mattoon, 27 Ill. App. 2d 400, 169 N. E. 2d 675, it is doubtful if the county court of Champaign County, having authorized the settlement and the giving of the releases, could by a subsequent order revoke such releases. But, assuming that the County Court did have the power to correct its mistake, if mistake there was, it would take more than a permissive order to correct the mistake. Where a release was given by order of court, it may only be held void, where the release is obtained by misrepresentation, overreaching, or other fraud. A unilateral mistake is not sufficient. Thomas v. Hollowell, 20 Ill. App. 2d 288, 155 N. E 2d 827; Clancy v. Pacenti, 15 Ill. App. 2d 177, 145 N. E. 2d 802; Fraser v. Glass, 311 Ill. App. 336, 35 N. E. 2d 953. As said in the Thomas v. Hollowell case, quoting American Jurisprudence on Release, Section 19: "The great weight of authority supports the doctrine that a release of a claim for personal injuries cannot be avoided merely because the injuries have proved more serious than the releasor, at the time of executing the release, believed them to be, or because the releasor made a bad bargain on account of a wrong estimate of the damages which would accrue." It is true that our courts have been inclined to set aside releases which subsequently prove to be grossly unfair or unjust. Ruggles v. Selby, 25 Ill. App. 2d 1, 165 N. E. 2d 733; Clancy v. Pacenti, 15 Ill. App. 2d 171, 145 N. E. 2d 802. Here there is no showing of a settlement that was grossly unfair or unjust. It is true the ward by his next friend, claims more serious injuries than the settlement called for. But the record shows that two competent attorneys acting for the conservator bank, determined that the amount received, on the basis of the facts and the injuries, was reasonable and recommended the settlement be made and the county court on the basis of these matters, authorized the [246]

settlement and the giving of the releases. In the case of Clancy v. Pacenti, 15 Ill. App. 2d 171, 145 N. E. 2d 802, the court while recognizing the trend of the courts to set aside releases where made under a mistake, said: "Yet it is important to preserve a field of free action within which parties may compromise their differences with substantial assurance that the matter will not arise again."

A decision in this case is difficult. On the one hand, nothing should be left undone to protect the rights of an incompetent. On the other hand, releases executed in good faith and without fraud should be given full faith and credit and upheld. Had there been any mistake, error or omission on the part of the conservator, we would be inclined to hold that the releases should be held invalid. But in this case, the conservator was represented by competent counsel. There probably were facts related to the case which involved the question as to whether there was any liability at all on the part of the defendants. The facts were investigated thoroughly, and the conservator was offered a sum which, in the opinion of these attorneys, was fair and reasonable. They recommended to the county court that the settlement be made and release be given. An order was entered in accordance to their recommendations. The case in Circuit Court of Champaign County involving the same parties, the same subject matters and the same facts, was dismissed.

We find no fraud, mistake, omission or that the settlement was grossly unfair or unjust. The mere pleading that the settlement was unfair or inadequate does not make it true. The judgment dismissing the complaint is affirmed.

Affirmed.

ROETH, P. J. and CARROLL, J., concur.